

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MARQUES PHILLIPS and CYNTHIA
PHILLIPS,

Plaintiffs,

v.

NO. CIV. S-04-0377 FCD PAN

MEMORANDUM AND ORDER

CITY OF FAIRFIELD, CHIEF OF
POLICE WILLIAM GRESHAM,
OFFICER MARK SCHRAER, OFFICER
CHAD TIGERT, OFFICER STEVE
TROJANOWSKI, JR., OFFICER MIKE
BEATTY, OFFICER MATTHEW
THOMAS, OFFICER STEPHEN RUIZ,
OFFICER TROY OVIATT, OFFICER
JEREMY NIPPER, OFFICER FRANCO
CESAR, OFFICER CADE BECKWITH,
and DOES 1 through 13,

Defendants.

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This matter is before the court on plaintiffs Marques
Phillips' and Cynthia Phillips' (collectively, "plaintiffs")
motion for a new trial pursuant to Rule 59 of the Federal Rules
of Civil Procedures and motion for relief from judgment pursuant

1 to Rule 60 of the Federal Rules of Civil Procedure. For the
2 reasons set forth below, plaintiffs' motions are DENIED.

3 **BACKGROUND¹**

4 This case arises out of the arrest of plaintiff Marques
5 Phillips on February 1, 2003. Plaintiffs contend that defendants
6 City of Fairfield and individual Fairfield police officers
7 arrested Marques Phillips without probable cause and used
8 excessive force in executing the arrest. This matter was
9 presented before a jury on October 31, 2006. Marques Phillips
10 asserted federal claims for violations of his Fourth Amendment
11 based upon defendants' alleged false arrest, excessive force, and
12 unreasonable search and asserted state claims for false arrest,
13 assault, battery, and intentional infliction of emotional
14 distress. Cynthia Phillips, Marques Phillips' mother, asserted a
15 state law claim for intentional infliction of emotional distress
16 based primarily on her proximity and observation of the arrest of
17 Marques Phillips. After a seven day jury trial, the jury
18 returned a verdict for defendants.

19 Plaintiffs' objections to the trial and jury verdict is
20 based upon alleged inconsistencies between sworn declarations
21 submitted by defendant Trojanowski and defendant Schraer in
22 support of their motion for summary judgment and the testimony
23 presented by defendants at trial. The declarations provide that
24

25 ¹ Neither plaintiffs nor defendants requested a
26 transcript of the jury trial in this case. As such, none has
27 been prepared or filed in this action. Therefore, the court does
28 not cite herein to the transcript, and the findings are based
upon the court's recollection of the evidence and argument
presented at trial, as refreshed by its review of a rough draft
of the transcript provided by the court reporter.

1 defendant Trojanowski was "concerned that [plaintiff] would
2 identify [him] as a police officer to the rest of the individuals
3 present in the parking lot" where the officers were conducting a
4 buy/bust operation. (Am. Decl. of Officer Steven Trojanowski Jr.
5 ("Trojanowski Decl."), filed Oct. 18, 2005, Docket # 118, ¶ 10);
6 (Am. Decl. of Sergeant Mark Schraer ("Schraer Decl."), filed Oct.
7 18, 2005, Docket # 120, ¶ 10). During opening statement,
8 defendants' attorney, Kimberly C. Colwell, stated that the
9 evidence would show that plaintiff Marques Phillips identified
10 defendant Trojanowksi by pointing at him and yelling "five-o."²
11 Defendants Trojanowski and Schraer testified that plaintiff
12 Marques Phillips identified Trojanowski in this manner.

13 Plaintiffs' attorney, Mister Phillips, cross-examined
14 defendants about the statements made in their declarations, which
15 only addressed *concerns about identification*, and their testimony
16 that plaintiff Marques Phillips *actually identified* defendant
17 Trojanowski as a police officer. Subsequently, upon examination
18 by Ms. Colwell, defendants Schraer and Trojanowski testified that
19 Ms. Colwell wrote their sworn declarations in support of their
20 motion for summary judgment and that these declarations were
21 never meant to be the entire truth.³ Mister Phillips moved
22

23 ² Specifically, Ms. Colwell stated that defendant
24 Trojanowski would testify that Marques Phillips approached his
25 car, pointed at him, stared him in the eyes and then said very
loudly: "Five-o, five-o, motherfucking five-o."

26 ³ Outside the presence of the jury, the court asked Ms.
27 Colwell about the content of the declarations. Ms. Colwell
stated that the declarations were crafted for defendants' motion
28 for summary judgment, and thus all papers associated with the
motion took plaintiffs' facts to be true for the purposes of the
(continued...)

1 defendant Trojanowski and Schraer's declarations into evidence,
2 published them to the jury, and used them extensively during his
3 closing argument to argue, among other things, that defendants
4 did not have probable cause to arrest plaintiff Marques Phillips.
5 Ms. Colwell moved into evidence portions of defendant Trojanowski
6 and Schraer's police report, which provided that Marques Phillips
7 identified Trojanowski as a police officer, and used it in her
8 closing argument to argue that defendants had probable cause to
9 arrest plaintiff Marques Phillips. Plaintiff contend that this
10 police report was fabricated. Plaintiffs also contend that Ms.
11 Colwell improperly bolstered the credibility of defendants
12 Trojanowski and Schraer in her closing arguments to the jury.

13 ANALYSIS

14 A. Motion for a New Trial

15 Rule 59 of the Federal Rules of Civil Procedure provides
16 that "[a] new trial may be granted to all or any parties an on
17 all or part of the issues . . . in an action in which there has
18 been a trial by jury . . . for any of the reasons for which
19 rehearings have heretofore been granted." Fed. R. Civ. P. 59
20 (2007). A trial court may only grant a new trial if "the verdict
21 is contrary to the clear weight of the evidence, or is based upon
22 evidence which is false, or to prevent, in the sound discretion
23 of the trial judge, a miscarriage of justice." Hansen v. Shell
24 Oil Co. 541 F.2d 1352, 1359 (9th Cir. 1976) (quoting Moist Cold

26 ³(...continued)
27 motion only. Ms. Colwell explained that the declarations
28 included only those facts that plaintiffs alleged and that the
officers could testify to as true.

1 Refrigerator Co. v. Lou Johnson, 249 F.2d 246, 256 (9th Cir.
2 1957); see Passantino v. Johnson & Johnson Consumer Products, 212
3 F.3d 493, 510 n.15 (9th Cir. 2000).

4 "While the trial court may weigh the evidence and
5 credibility of the witnesses, the court is not justified in
6 granting a new trial 'merely because it might have come to a
7 different result from that reached by the jury.'" Roy v.
8 Volkswagen of Am., Inc., 896 F.2d 1174, 1176 (9th Cir. 1990)
9 (quoting Wilhelm v. Associated Container Transp. (Australia)
10 Ltd., 648 F.2d 1197, 1198 (9th Cir. 1981)). "[I]f the jury's
11 verdict is not clearly against the weight of the evidence, the
12 trial court abuses its discretion in ordering a new trial." Id.
13 However, "[i]f having given full respect to the jury's findings,
14 the judge on the entire evidence is left with the definite and
15 firm conviction that a mistake has been committed," a new trial
16 should be granted. Landes Const. Co., Inc. v. Royal Bank of
17 Canada, 883 F.2d 1365, 1371-72 (9th Cir. 1987).

18 When the motion is based upon the alleged misconduct of
19 parties, counsel, or witnesses, the Ninth Circuit has held that a
20 new trial is properly granted where a party can:

21 (1) prove by clear and convincing evidence that the
22 verdict was obtained through fraud, misrepresentation,
or other misconduct [and]

23 (2) establish that the conduct complained of prevented
24 the losing party from fully and fairly presenting his
case or defense.

25 Wharf v. Burlington N. R.R. Co., 60 F.3d 631, 637 (9th Cir.
26 1995).

27 Plaintiffs move for a new trial on grounds that (1) the
28 verdict is contrary to the clear weight of the evidence; (2) the

1 verdict is based on false or perjurious evidence; (3) the verdict
2 is a miscarriage of justice; and (4) defendants' attorney, Ms.
3 Colwell, engaged in misconduct which permeated the entire
4 proceeding.

5 **1. Clear Weight of the Evidence**

6 Plaintiffs argue that the jury verdict is against the clear
7 weight of the evidence. Specifically, plaintiffs contend that
8 defendant Trojanowski's and defendant Schraer's declarations are
9 "insurmountable evidence" that defendants did not have probable
10 cause to arrest Marques Phillips. After weighing the evidence
11 and assessing the credibility of the witnesses, the court
12 disagrees.

13 Plaintiff was arrested pursuant to California Health and
14 Safety Code Section 11532 and California Penal Code § 148. Any
15 alleged inconsistencies between defendant Trojanowski's and
16 defendant Schraer's declarations and their trial testimony
17 relates to the issue of whether defendants were merely *concerned*
18 that plaintiff would identify them and compromise the buy/bust
19 operation or whether plaintiff *actually* identified them in an
20 attempt to obstruct the operation. This "inconsistency" would
21 apply only to whether there was probable cause to arrest pursuant
22 to § 148, which provides that "[e]very person who willfully
23 resists, delays or obstructs any public officer" in the execution
24 of his duties shall be fined and or imprisoned. Cal. Pen. Code §
25 148. The thrust of plaintiffs' argument is that the court should
26 only consider the declarations of defendant Trojanowski and
27 defendant Schraer, which addressed *concerns* about identification.

28 /////

1 At trial, both plaintiffs and defendants presented
2 substantial evidence regarding the issue of probable cause to
3 arrest under California Penal Code § 148. Defendants presented
4 evidence that plaintiff Marques Phillips identified Officer
5 Trojanowski during an undercover operation by yelling "five-o."
6 Defendants also presented evidence that Marques Phillips did not
7 get down on the ground immediately when ordered to do so, and
8 that he fought and struggled with defendant officers. Plaintiffs
9 presented evidence that Marques Phillips did not identify the
10 undercover officers and that the prior sworn declarations of
11 defendants Trojanowski and Schraer did not provide that an
12 identification was made. Plaintiffs also presented evidence that
13 Marques Phillips did not resist arrest. Vigorous cross-
14 examination was performed by plaintiffs' counsel, including
15 vehement probing of the veracity of defendants Trojanowski and
16 Schraer. The verdict hinged on the jury's evaluation of the
17 credibility of plaintiffs' witnesses and defendants' witnesses.
18 Apparently, the jury found defendants' witnesses to be more
19 credible. After a review of the trial testimony, the court is
20 not left "with the definite and firm conviction" that the jury
21 made a mistake in making this determination. See Landes Const.
22 Co., Inc., 833 F.2d at 1372. Rather, the jury's verdict is
23 supported by substantial evidence.⁴

24
25 ⁴ Plaintiffs also assert that the verdict is against the
26 clear weight of the evidence because Sergeant Grace, the officer
27 who conducted the internal affairs investigation of the incident,
28 testified at trial that defendant Trojanowski was not working
undercover. The court does not recollect hearing such testimony,
nor can it find any such testimony in the transcript. Rather,
(continued...)

1 Further, defendants also asserted that they had probable
2 cause to arrest plaintiff Marques Phillips pursuant to § 11532 of
3 the California Health and Safety Code. Section 11532 sets forth
4 the guidelines for unlawful loitering in a public place with the
5 intent to engage in narcotics related activity. Specifically, §
6 11532(b)(10) provides that a factor "in determining whether a
7 person has the requisite intent to engage in drug-related
8 activity" is whether that person has engaged "in any other
9 behavior indicative of illegal drug-related activity" in the past
10 six months. Id. Defendants presented evidence that the parking
11 lot where plaintiff was arrested was known for high crime and
12 high levels of narcotics sales. Defendants also presented
13 evidence that Marques Phillips had been involved in drug related
14 activity within the prior 24 hours and that Officer Trojanowski
15 was aware of these incidents. The evidence at trial demonstrated
16 that Marques Phillips' activity in the parking lot appeared to
17 defendant officers to violate § 11532. Therefore, evidence
18 presented by defendants at trial also demonstrated that the
19 officers had probable cause to arrest plaintiff under § 11532.⁵

20 _____
21 ⁴(...continued)
22 plaintiffs' counsel asked the witness about this issue, defense
23 counsel objected before an answer was given, and a side bar
24 conference was held. After discussion, the question was
25 abandoned, and no testimony was given on this issue. Therefore,
26 plaintiffs' argument is without merit.

27 ⁵ Plaintiffs assert that the court's ruling on summary
28 judgment held that defendants did not have probable cause to
arrest plaintiff Marques Phillips under § 11532 as a matter of
law. This misstates the court's ruling. The court found that,
viewing the evidence in the light most favorable to the
plaintiff, the evidence was insufficient to find probable cause
as a matter of law; therefore, defendants' motion for summary
(continued...)

1 **2. False or Perjurious Evidence/Miscarriage of Justice**

2 Plaintiffs also argue that the verdict is based upon false
3 or perjurious evidence and is a miscarriage of justice because
4 plaintiffs contend that defendant Trojanowski's and defendant
5 Schraer's testimony is contrary to their prior sworn
6 declarations. Defendants' prior declarations do not directly
7 contradict the testimony at trial. While the significant fact of
8 actual identification of Officer Trojanowski by Marques Phillips
9 was omitted from the declarations, nothing in the declarations
10 provided that such identification did not occur. Rather,
11 evidence was presented at trial that defendants tailored their
12 versions of the events at issue to include only those facts that
13 plaintiffs alleged and that the officers could testify to as
14 true, in an attempt to show that summary judgment could be
15 granted even if the court accepted plaintiffs' version of the
16 facts. While the court does not comment on the propriety or
17 effectiveness of employing this litigation strategy, it does not
18 constitute falsification of evidence or perjury.⁶ Therefore, the
19 verdict was not based on false or perjured evidence and did not
20 constitute a miscarriage of justice.

21 _____
22 ⁵(...continued)
23 judgment was denied. The court found that there was a triable
24 issue regarding probable cause to arrest Marques Phillips under §
25 11532. The court did not grant summary judgment for plaintiffs
on this issue, nor could it, as plaintiffs did not file a motion
for summary judgment.

26 ⁶ Further, plaintiffs' counsel vigorously challenged the
27 credibility of defendants Trojanowski and Schraer based upon the
28 significant omission in their prior sworn declarations. These
declarations were also admitted into evidence for consideration
by the jury. Despite plaintiffs' counsel's best efforts, the
jury apparently believed defendants' testimony.

1 **3. Misconduct**

2 Plaintiffs asserts that they are entitled to a new trial
3 because Ms. Colwell committed misconduct which sufficiently
4 permeated the entire proceeding. Specifically, plaintiffs
5 contend that Ms. Colwell committed misconduct by referencing
6 plaintiff Marques Phillips' identification of Officer Trojanowski
7 in her opening statement and eliciting testimony from witnesses
8 regarding the identification on direct examination. Plaintiffs
9 assert that this constitutes misconduct because testimony
10 relating to this identification is false or perjurious. As set
11 forth above, the court does not find such testimony to be false
12 or perjurious, and thus, Ms. Colwell's conduct in referencing it
13 in opening statements and eliciting it on direct examination did
14 not constitute misconduct.

15 Plaintiffs contend that Ms. Colwell committed misconduct by
16 eliciting questions regarding the circumstances under which the
17 prior sworn declarations were prepared. Defendants Trojanowski
18 and Schraer testified that Ms. Colwell wrote their sworn
19 declarations, that their sworn declarations were never meant to
20 be the entire truth, and that their testimony at trial is the
21 entire truth. However, this testimony was elicited by Ms.
22 Colwell only after vigorous cross-examination by plaintiffs'
23 counsel about the significant omission in defendants'
24 declarations relating to the actual identification of Officer
25 Trojanowski by Marques Phillips. Plaintiffs' counsel squarely
26 placed defendant Trojanowski's and defendant Schraer's
27 credibility at issue, and defendants' counsel had a right to
28 rehabilitate the witnesses through an explanation of the

1 circumstances which gave rise to the declarations at issue. As
2 such, Ms. Colwell did not commit misconduct by questioning
3 defendants Trojanowski and Schraer about their prior sworn
4 declarations.

5 Plaintiffs also contend that Ms. Colwell committed
6 misconduct by moving into evidence a "fabricated" police report.
7 Plaintiffs only basis for asserting that this report is
8 "fabricated" is that it includes the officers' account that
9 Marques Phillips actually identified Officer Trojanowski as a
10 police officer during an undercover operation, and thus,
11 allegedly contradicts the prior sworn declarations of defendants
12 Trojanowski and Schraer. As set forth above, the declarations do
13 not directly contradict evidence that Marques Phillips identified
14 Officer Trojanowski. Plaintiffs offer no evidence to support
15 their conclusory assertion that the police report was fabricated
16 by defendants. Therefore, Ms. Colwell did not commit misconduct
17 by moving the police report into evidence.

18 Further, plaintiffs assert that Ms. Colwell committed
19 misconduct by arguing to the jury during her closing arguments
20 that any inconsistencies between defendants' declarations and
21 their trial testimony were her fault and that defendants should
22 not be held liable for her mistakes. Plaintiffs severely
23 mischaracterize Ms. Colwell's closing statements. The only
24 statements that could remotely be identified as the basis for
25 plaintiffs' accusations of misconduct were made at the beginning
26 of Ms. Colwell's closing argument. In sum and substance, Ms.
27 Colwell apologized for anything that Ms. Colwell or her co-
28 counsel, Jennifer Adams, did during the trial that distracted the

1 jury from the case or that the jury did not like. Ms. Colwell
2 asked that any such conduct by counsel during trial not be held
3 against her clients. Ms. Colwell asked the jury to weigh the
4 evidence based on what the testimony that they heard from
5 defendants on the stand and under oath because the jury is the
6 best judge of their character and how truthful they were being.
7 Such statements do not constitute improper vouching or attorney
8 misconduct. Rather, these statements are similar to portions of
9 the Ninth Circuit's Model Jury Instructions, including those
10 given to the jury in this case. Specifically, the jury was
11 instructed to follow the law and not be influenced by any
12 personal likes or dislikes, opinions, prejudices, or sympathy.
13 The jury was also instructed that arguments and statements by the
14 lawyers are not evidence. As such, Ms. Colwell did not commit
15 misconduct in the delivery of her closing arguments.

16 Therefore, because plaintiffs have failed to point to any
17 misconduct by Ms. Colwell during the trial, plaintiffs have not
18 met their burden in demonstrating that they are entitled to a new
19 trial.

20 **B. Motion for Relief from Judgment**

21 Rule 60(b) provides in relevant part that:
22 On motion and upon such terms as are just, the court may relieve
23 a party . . . from a final judgment, order, or proceeding for the
24 following reasons: (1) mistake, inadvertence, surprise, or
25 excusable neglect; . . . (3) fraud . . . , misrepresentation, or
26 other misconduct of an adverse party; . . . or (6) any other
27 reason justifying relief from the operation of the judgment.
28 Fed. R. Civ. P. 60 (2007). Relief under rule 60(b) is not a

1 matter of right and rests in the trial court's sound discretion.
2 Martella v. Marine Cooks and Stewards Union, 448 F.2d 729, 730
3 (9th Cir. 1971); Independence Lead Mines Co. v. Kingsbury, 175
4 F.2d 983, 988 (9th Cir. 1949). Such relief is an extraordinary
5 remedy and is granted only in exceptional circumstances. Hunter
6 v. Underwood, 362 F.3d 468, 475 (8th Cir. 2004); see Russell v.
7 Cunningham, 279 F.2d 797, 804 (9th Cir. 1960).

8 **1. Surprise**

9 Plaintiffs contend that they are entitled to relief from
10 judgment because they were surprised by defendant Trojanowski and
11 Schraer's testimony that plaintiff Marques Phillips actually
12 identified defendant Trojanowski during the undercover buy/bust
13 operation. Plaintiffs assert that defendants dropped this
14 "claim" at summary judgment and surprised plaintiff at trial by
15 reintroducing this theory of probable cause.

16 Plaintiffs fail to cite any relevant legal authority for
17 their argument that by not moving for summary judgment on this
18 basis, defendants waived their theory of probable cause based
19 upon actual identification by Marques Phillips. In essence,
20 plaintiffs' position is that if a party fails to move for summary
21 judgment on a certain basis, that basis is waived, even if it is
22 clear that adjudication based upon that basis would require a
23 factual determination. Such a position is without merit and
24 would defeat the purposes of summary judgment.

25 In this case, defendants moved for summary judgment on
26 plaintiff Marques Phillips' Fourth Amendment claim on the basis
27 that defendants had probable cause to arrest pursuant to § 11532
28 of the California Health and Safety Code. The defendants did not

1 rely upon actual identification of Officer Trojanowski by Marques
2 Phillips as probable cause to arrest pursuant to California Penal
3 Code § 148. As evidenced by the argument at trial, the parties
4 clearly disputed whether Marques Phillips actually identified
5 Officer Trojanowski. Therefore, this would not have been an
6 appropriate basis for summary judgment.

7 Further, notwithstanding that defendants never abandoned
8 this theory, plaintiffs should not have been surprised by defense
9 counsel's opening statement and the testimony of defendants
10 Trojanowski and Schraer. The theory of probable cause based upon
11 actual identification was included in the internal affairs
12 investigation report. Plaintiffs' expert was asked questions
13 about this theory in his deposition. Finally, this theory was
14 addressed in defendants' trial brief, filed more than a week
15 before the start of trial. Plaintiffs' counsel did not raise
16 this issue to the court at any of the pre-trial hearings,
17 including the hearing on the parties' motions in limine held on
18 the first day of trial. Therefore, plaintiffs were not unfairly
19 surprised by the presentation of this theory at trial.

20 **2. Fraud, Misrepresentation, or Other Misconduct**

21 Plaintiffs contend that they should be relieved from
22 judgment because defendants engaged in fraud, misrepresentation,
23 or other misconduct. When a party moves for relief from judgment
24 on the grounds of fraud, misrepresentation, or other misconduct,
25 the moving party must show, by clear and convincing evidence,
26 that the opponent engaged in such conduct and that the conduct
27 prevented the moving party from fully and fairly presenting his
28 or her case or defense. De Saracho v. Custom Food Machinery,

1 Inc., 206 F.3d 874, 880 (9th Cir. 2000).

2 Plaintiffs claim that defendants Trojanowki and Schraer
3 engaged in fraud, misrepresentation, or misconduct based upon
4 their allegedly perjurious testimony that Marques Phillips
5 actually identified Officer Trojanowski on the night of the
6 incident at issue. As set forth above, there is no evidence that
7 defendants committed perjury, fraud, or misconduct. Further, as
8 set forth above, plaintiffs' counsel vigorously challenged the
9 credibility of defendants Trojanowski and Schraer based upon
10 their prior declarations. Therefore, plaintiffs are not entitled
11 to relief from judgment on this ground.

12 **3. Res Judicata**

13 Finally, plaintiffs claim that they should be relieved from
14 judgment because res judicata precludes all statements and
15 evidence that the defendants arrested Marques Phillips because he
16 actually identified Officer Trojanowski. Again, plaintiffs based
17 their arguments on a faulty understanding of summary judgment.

18 There was no final judgment regarding plaintiffs' Fourth
19 Amendment claims prior to the jury verdict in this matter. The
20 court denied defendants' motion for summary judgment on these
21 claims and plaintiffs did not file a motion for summary
22 judgments. As set forth above, plaintiffs fail to cite any case
23 law in support of their argument that defense theories may be
24 precluded if they are not raised on summary judgment.⁷

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26 ⁷ Plaintiffs cite Nguyen v. United States, 792 F.2d 1500,
27 1503 (9th Cir. 1986) in support of their preclusion argument.
28 Nguyen is inapplicable. In Nguyen, the court addressed the
party's motion for leave to amend to raise new issues after the
(continued...)


1 Therefore, plaintiffs are not entitled to relief from judgment on
2 the basis of preclusion or res judicata.

3 **CONCLUSION**

4 Based on the foregoing analysis, plaintiffs' motion for a
5 new trial pursuant to Rule 59 of the Federal Rules of Civil
6 Procedures and motion for relief from judgment pursuant to Rule
7 60 of the Federal Rules of Civil Procedure is DENIED.

8 IT IS SO ORDERED.

9 DATED: March 8, 2007

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11 
12 FRANK C. DAMRELL, JR.
13 UNITED STATES DISTRICT JUDGE
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26 ⁷(...continued)
27 entry of summary judgment. Id. The court noted that the value
28 of summary judgment would be diminished if a party could amend
the issues to be decided in the same case after that party lost
on summary judgment. This is not an issue raised in this case.